UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE:

NELLA FERNANDA HARVEY

Debtor.
_____/

CASE NO.: 18-30040-KKS
CHAPTER: 7

NELLA FERNANDA HARVEY

Plaintiff,
v.

UNITED STATES DEPARTMENT OF EDUCATION, et. al.,

Defendants.
_____/

ADV. NO.: 18-03005-KKS

ORDER GRANTING *UNITED STATES DEPARTMENT OF EDUCATION'S MOTION FOR SUMMARY JUDGMENT* (DOC. 55)

THIS MATTER is before the Court on the *United States Department of Education's Motion for Summary Judgment* ("MSJ," Doc. 55) and *Plaintiff's Amended Response to United States Department of Education's Motion for Summary Judgment* ("Response," Doc. 80).

Self-represented Plaintiff, Nella Fernanda Harvey, brought this adversary proceeding seeking a discharge of her student loan debt as an

"undue hardship" under 11 U.S.C. § 523(a)(8).[1] Defendant, United States Department of Education ("DOE"), filed the MSJ asserting that Plaintiff cannot satisfy the three-part test for undue hardship set forth in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987), as adopted by the Eleventh Circuit Court of Appeals.[2] Based on the pleadings, depositions, affidavits, and other evidence before the Court, the MSJ is due to be granted for the reasons set forth below.

JURISDICTION

This is a core proceeding as defined in 28 U.S.C. § 157(b), and the Court has jurisdiction under 28 U.S.C. § 1334 and the Standing Order of Reference signed by Chief Judge M. Casey Rodgers dated June 5, 2012.

BACKGROUND

Plaintiff immigrated to the United States in 2002 at the age of forty (40), having previously worked as a pre-school teacher and painting instructor in her native country of Columbia.[3] She met and married her current husband, Robert Harvey shortly after arriving in the United States.[4] Plaintiff attended Broward College beginning in 2008, earning an Associate of Arts degree in

[1] *Complaint to Determine the Dischargeability of Debtor's Student Loans*, ("Complaint") Doc. 1.
[2] *In re Cox*, 338 F.3d 1238, 1242 (11th Cir. 2003).
[3] Docs. 55-9, p. 14; and 55-17, pp. 60-62.
[4] Doc. 55-17, p. 9.

2013, with honors.[5] While earning her degree, Plaintiff incurred student loans ("Loans") totaling $32,503.42.[6] The Loans became due and payable in 2013.[7] By June of 2018, accrued interest on the Loans totaled $7,952.47.[8]

Near the start of the Loans' repayment period, Plaintiff and her husband (collectively, the "Harveys") allegedly experienced financial and medical crises: Plaintiff's husband lost his job and suffered a heart attack in 2012;[9] in 2013 the Harveys' landlord raised the rent on their five-bedroom, three bathroom house in Fort Lauderdale, Florida.[10] Two (2) years later the Harveys moved to their current residence, a four-bedroom house abutting a golf course in Navarre, Florida.[11]

Since 2012, the Harveys' sole source of monthly income has been Mr. Harvey's Social Security and pension of $1,883 and $5,557.53, respectively.[12] Mr. Harvey testified in his deposition that Plaintiff will not receive any pension income after his death.[13] Plaintiff has not held a job throughout the

[5] *Id.* at pp. 63, 68-70.
[6] Doc. 55-4, p. 3.
[7] Doc. 55-9, p. 13.
[8] Doc. 55-4, p. 3.
[9] Docs. 1-5; and 55-17, p. 12-13.
[10] Doc. 55-17, pp. 12-14.
[11] Doc. 55-17, pp. 10-12.
[12] Doc. 55-9, p. 13; *In re Harvey,* Case No.: 18-30040-KKS, Doc. 16-1, p. 23, *All Remaining Schedules* (Bankr. N.D. Fla).
[13] Doc. 55-18, pp. 21-22.

repayment period.[14] She has sporadically sold her artwork to family members.[15] Plaintiff has made very little effort to seek employment: she applied for a housekeeping job at a hotel shortly after moving to Navarre and made no further efforts until just before her deposition in 2019 when she applied for a childcare job at one daycare and visited the website of another daycare.[16]

Plaintiff attributes her failure to obtain employment and engage in a more comprehensive job search to several factors: she claims that she is not fluent in English, which is her second language, lacks CPR certification training necessary for many jobs in childcare, and has physical infirmities associated with osteoporosis, degenerative joint disorder, and thyroiditis.[17] In addition, Plaintiff seeks an "undue hardship" discharge because of her husband's outstanding tax liabilities.[18] In opposition to the MSJ, Plaintiff filed an affidavit in which her husband attests that he owes $15,939.33 to the state of California and $116,984.49 to the Internal Revenue Service; in his words: "[a]ll these taxes will ultimately have to be paid. Solution is yet

[14] Doc. 55-9, p. 12.
[15] Docs. 55-9, p. 13; and 55-17, pp. 40-42.
[16] Doc. 55-17, pp. 42-46, 86. Plaintiff has never contacted the State of Florida or any Florida school district regarding childcare employment qualifications or opportunities. Other than applying to work at a hotel years ago, she has not applied for any job other than in childcare. *Id.* at pp. 45-46.
[17] Docs. 1-12; 1-15; 55-9, p. 14; 55-17, p. 47; and 80-10.
[18] Docs. 1-16; 80-2, pp. 4-5; 80-6, pp. 9-10; and 80-8.

unknown. But it is certain that the payment of $790 a month against the $31,791 currently under levy will commence on or about May 2020 and continue for 6 years."[19] Plaintiff maintains that her Loans should be discharged because her husband's eventual monthly payments to the IRS will result in significant and increasing monthly income deficits.[20]

Plaintiff's Bankruptcy Schedules and the Harveys' depositions reflect the following monthly expenses: (1) rent of $1,800;[21] (2) telephone, cellphone, internet, and television service of $478.48;[22] (3) food and housekeeping expenses of $867, including purchases at high-end, organic grocery stores;[23] (4) car payments of $765 for a 2017 Volkswagen Tiguan with a sunroof, heated leather seats, and satellite radio;[24] (5) $45 for pet health insurance;[25] and (6) a $1,100 term life insurance policy on Mr. Harvey.[26] In addition to these monthly expenses, Plaintiff has traveled multiple times to Columbia for dental procedures and the Harveys have taken vacations to Georgia, Texas,

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[19] Doc. 80-2, p. 4-5.
[20] Docs. 80-6, pp. 9-10; and 80-8.
[21] Doc. 55-17, pp. 10-11.
[22] *In re Harvey,* Case No.: 18-30040-KKS, Doc. 16-1, p. 25, *All Remaining Schedules* (Bankr. N.D. Fla). The Harveys' cell phone bill includes phone for Plaintiff's mother, who lives in Atlanta.
[23] *Id.*; Doc. 55-17, p. 98.
[24] *Id.;* Doc. 55-17, pp. 105-6.
[25] *In re Harvey,* Case No.: 18-30040-KKS, Doc. 16-1, p. 25, *All Remaining Schedules* (Bankr. N.D. Fla).
[26] Doc. 55-18, p. 18.

Louisiana and North Carolina, during the Loans' repayment period.[27]

Plaintiff has made no Loan payments, has not attempted to enter an income-contingent repayment plan ("ICRP"), and has not communicated with DOE regarding repayment options.[28] Plaintiff applied for and has been granted Loan repayment forbearances until she allegedly reached the limit for doing so, at which point she filed the instant adversary proceeding.[29]

In his deposition, Plaintiff's husband agreed that the Harveys have never pursued repayment options for the Loans. According to him, at one time they investigated a long-term payment program but they had too much income for Plaintiff to qualify for that program.[30] He further testified that they never pursued another income-based repayment plan; their reasoning was their concern that if Plaintiff only paid a portion of the loans, the resulting balance would become taxable income.[31] They also recognized that if Plaintiff paid monthly payments over a long period of time she would have to "go through a financial statement analysis every year."[32]

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[27] Doc. 55-17, pp. 23-25, 113-16.
[28] Docs. 55-17, pp. 103-04; and 55-18, pp. 31-32.
[29] Docs. 55-9, p. 13; and 55-18, p. 32.
[30] Doc. 55-18, p. 33.
[31] *Id.* at pp. 33-34.
[32] *Id.* at p. 34.

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(a), made applicable by Fed. R. Bankr. P. 7056, summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[33] A material fact is one that "might affect the outcome of the suit under governing law," and a fact is in dispute only when the opposing party "submits evidence such that a trial would be required to resolve the difference."[34] The moving party has the burden to demonstrate the absence of a genuine issue of material fact, after which the nonmoving party must set forth sufficient facts to establish a genuine issue for trial.[35] "[T]he evidence and inferences drawn from the evidence are viewed in the light most favorable to the nonmoving party, and all reasonable doubts are resolved in [her] favor."[36]

DISCUSSION

A debtor seeking a discharge of student loan debt under 11 U.S.C. § 523(a)(8) must demonstrate that repayment would "impose an undue

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[33] Fed. R. Civ. P. 56(a), made applicable by Fed. R. Bankr. P. 7056.
[34] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). *In re Rosenberg*, 610 B.R. 454, 457 (Bankr. S.D.N.Y. 2020).
[35] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986); *In re Macon*, No. 12-42846-PWB, 2014 WL 5080410, at *1 (Bankr. N.D. Ga. Oct. 6, 2014); *In re Nightingale*, 529 B.R. 641, 646-47 (Bankr. M.D.N.C. 2015).
[36] *WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988).

hardship."[37] The term "undue hardship" is undefined in the Code. The Eleventh Circuit Court of Appeals has adopted the undue hardship test set forth in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987).[38] The so-called *Brunner* test requires a debtor seeking a discharge under 11 U.S.C. § 523(a)(8) to demonstrate by a preponderance of the evidence:

> (1) that the debtor cannot maintain . . . a minimal standard of living . . . if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period . . . ; and (3) that the debtor has made good faith efforts to repay the loans.[39]

The *Brunner* test requirements are conjunctive: a party seeking discharge of student loans under § 523(a)(8) must demonstrate that they meet all three *Brunner* prongs to prevail.[40]

After considering the evidence presented and viewing it in the light most favorable to Plaintiff, the Court finds that genuine issues of material fact exist with respect to the first two prongs of the *Brunner* test, but that DOE has shown, based on the undisputed material facts, that Plaintiff cannot meet the

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[37] 11 U.S.C. § 523(a)(8) (2020); *In re Beece*, No. 6:17-AP-00086-KSJ, 2019 WL 1769605, at *1 (Bankr. M.D. Fla. Apr. 18, 2019).
[38] *In re Cox*, 338 F.3d 1238, 1241-42 (11th Cir. 2003); *see also In re Acosta-Conniff*, 686 F. App'x 647, 648 (11th Cir. 2017).
[39] *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).
[40] *In re Davis*, 373 B.R. 241, 245 (W.D.N.Y. 2007) (*quoting In re Faish*, 72 F.3d 298, 306 (3d Cir. 1995)).

third prong of the *Brunner* test.

1. Whether Plaintiff can maintain a minimal standard of living if forced to repay the Loans

The first prong of *Brunner* requires a debtor to demonstrate that based on her "current income and expenses" she cannot make the required loan payments and "maintain a minimal standard of living."[41] Whether a debtor's income is above or below the federal poverty line is relevant but not determinative; more central is whether the debtor's current expenses could be reduced to allow an income surplus sufficient to repay the student loans while allowing the debtor to maintain a minimal standard of living.[42] Courts consider total household income and expenses, including any attributable to a non-debtor spouse, when assessing a debtor's standard of living.[43] The extent to which expenditures can be reduced is determined in light of the Court's "common sense knowledge gained from ordinary observations in daily

[41] *In re Matthews-Hamad*, 377 B.R. 415, 421 (Bankr. M.D. Fla. 2007) (*citing Brunner*, 831 F.2d. at 396).
[42] *In re Booth*, 410 B.R. 672, 676 (Bankr. E.D. Wash. 2009); *In re Augustin*, 588 B.R. 141, 149 (Bankr. D. Md. 2018); *In re Douglas*, 366 B.R. 241, 254 (Bankr. M.D. Ga. 2007). *In re Davis*, 373 B.R. 241, 248 (W.D.N.Y. 2007) (*citing In re White*, 243 B.R. 498, 507–512 (Bankr. N.D. Ala.1999)).
[43] *E.g.*, *In re Augustin*, 588 B.R. 141, 150 (Bankr. D. Md. 2018); *In re Wynn*, 378 B.R. 140, 148 (Bankr. S.D. Miss. 2007). As one court reasoned, "a family member can be a dependent of, or a provider for, the debtor. Either way, the family member's very existence impacts the quality of the debtor's lifestyle, maybe adversely, maybe favorably." *In re White*, 243 B.R. 498, 510 (Bankr. N.D. Ala. 1999).

life and general experience."[44]

As primary support for her contention that she will be unable to maintain a minimal standard of living in the future, Plaintiff focuses on the Harveys' current monthly income deficit and the prospect of future payments towards Mr. Harvey's tax liabilities. These factors combined, she submits, negate any future ability to repay her student Loans.[45] But the only "evidence" that Mr. Harvey will begin making payments to the IRS is the Harveys' deposition and affidavit testimony. Documents Plaintiff filed in opposition to the MSJ suggest exactly the opposite: that neither Plaintiff nor her husband have any intention to make payments to the IRS.

The documentary evidence conclusively shows that neither Plaintiff nor her husband have made payments on any debt to the IRS or DOE since at least 2006.[46] Instead, both Harveys have concertedly avoided paying the U.S. government. Their efforts currently consist of this adversary proceeding, through which Plaintiff seeks release from her student loans, and Mr.

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[44] *In re Douglas*, 366 B.R. 241, 253 (Bankr. M.D. Ga. 2007). *See also In re Reagan*, 587 B.R. 296, 300 (Bankr. W.D. Pa. 2018); *In re Ivory*, 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001); *In re Nightingale*, 529 B.R. 641, 648 (Bankr. M.D.N.C. 2015).

[45] *In re Harvey,* Case No.: 18-30040-KKS, Doc. 16-1, p. 26, *All Remaining Schedules* (Bankr. N.D. Fla).

[46] The IRS Notice of Determination dated February 8, 2017 sustained IRS' notice of intent to levy for Mr. Harvey's 2007- and 2008-income taxes. Doc. 80-6, pp. 2-4.

Harvey's continuing appeal of the IRS assessment or, at minimum, the levy.[47]

Not only has Plaintiff offered dubious proof that installments on her husband's tax liability are imminent, DOE accurately points out that Plaintiff has failed to demonstrate an inability to maintain a minimal standard of living now, or when she filed her Chapter 7 petition. Significantly, the Harveys' income is 528% of the federal poverty line.[48] Also, by any common sense notion, Plaintiff's expenditures go far beyond those required for a minimal standard of living and can be reduced: Plaintiff and her husband have no need for a four-bedroom home on a golf course in a resort area on Florida's gulf coast; they drive a recently-acquired, new luxury vehicle for which the monthly payments are $765;[49] Plaintiff buys organic foods for herself and her husband; the couple buys specialty foods and pet health insurance for their elderly dog; the Harveys have taken vacations during the two (2) years before Plaintiff filed Chapter 7; and they provide approximately

[47] *Id.* The IRS Notice of Determination notified Mr. Harvey that he had thirty (30) days to appeal, which he did. Doc. 80-6, pp. 2-4. An Order issued December 20, 2019 by the United States Tax Court states that the Office of Appeals held a supplemental hearing on Mr. Harvey's appeal on November 20, 2019. Doc. 80-5, p. 2. According to that Order, Mr. Harvey and the Commissioner of Internal Revenue had until February 3, 2020 by which to file a report (joint or otherwise) "describing the status of the case." *Id.* at 2-3.

[48] Annual Update of the HHS Poverty Guidelines, 84 FR 1167-02.

[49] The Harveys upgraded their vehicle to a 2017 Volkswagen Tiguan with heated leather seats, a sunroof, GPS, and a satellite radio. Doc. 55-17, pp. 105-6.

$600 per month in support for Plaintiff's mother, who resides elsewhere.[50]

This Court has not located, and neither party has cited, a single case in which a debtor with income over 500% of the poverty level has been found to have shown an inability to maintain a minimal standard of living under the *Brunner* test. It is also well established that luxury-type expenditures like Plaintiff's are inconsistent with a minimal standard of living.[51] Plaintiff attempts to explain away her "need" for this luxury lifestyle, but her excuses for spending these sums of money are not enough.[52] In this District:

> [I]t is not sufficient for the debtor simply to show that being required to repay the [student loan] debt would diminish his or her existing lifestyle. Under *Brunner,* the debtor is entitled to a "minimal standard of living" for herself and her dependents, but the debtor is not entitled to maintain whatever standard of living she has previously attained, nor the level she would maintain if not required to repay the debt. "Minimal" does not mean preexisting, and it does not mean comfortable.[53]

Although Plaintiff can undoubtedly reduce living expenses, whether doing so would enable her to make payments on the Loans is not yet clear.

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[50] Doc. 55-18, pp. 36-37.

[51] *E.g.*, *In re Miller*, 409 B.R. 299, 313, 320-21 (Bankr. E.D. Pa. 2009) (finding that a couple's payments to live in a five-bedroom house with one live-in dependent and one daughter in college was inconsistent with a minimal standard of living); *In re Halatek*, 592 B.R. 86, 98-99 (Bankr. E.D.N.C. 2018) (finding that debtor's "comfortable" lifestyle went beyond a minimal standard because she drove a three-year old SUV, subscribed to premium television channels, and maintained other discretionary expenditures).

[52] Plaintiff's justifications for these luxury expenditures include her and her husband's alleged medical issues, their dog's advanced age, and their need for "reliable transportation."

[53] *Educ. Credit Mgmt. Corp. v. Stanley*, 300 B.R. 813, 817–18 (N.D. Fla. 2003).

The prospect that Mr. Harvey may begin making $790 monthly payments to the IRS in the near future raises a question of material fact.[54] The Harveys' income deficit, reflected on Plaintiff's bankruptcy Schedules, is $380 per month.[55] With an additional monthly expense of $790 and no other adjustments, their monthly deficit will increase to $1,170. This deficit could prevent Plaintiff from repaying the Loans even if she were to reduce other expenses to a minimal standard.[56]

Whether Mr. Harvey will actually begin making payments to the IRS is far from certain, but courts have adopted a flexible approach that allows for consideration of near-future changes under the first prong of *Brunner*.[57] The uncertainty over whether Mr. Harvey will begin making payments to the IRS in the near future raises a genuine issue of fact for trial on the first prong of

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[54] *E.g.*, *In re Rumer*, 469 B.R. 553, 565-66 (Bankr. M.D. Pa. 2012).

[55] *In re Harvey,* Case No.: 18-30040-KKS, Doc. 16-1, p. 26, *All Remaining Schedules* (Bankr. N.D. Fla).

[56] *See In re Clavell*, 611 B.R. 504, 518 (Bankr. S.D.N.Y. 2020) ("It makes sense that likely tax refunds (or likely tax payments in the event of under-withholding) should also be taken into consideration. Otherwise, a debtor's available funds would be under-estimated (or over-estimated) due to an inaccuracy in withholding rates."); *Rumer*, 469 B.R. at 565-66 (finding that genuine issue of material fact remained even though debtors' expenses exceeded a minimal standard because the monthly repayment amount had not been established and it was unclear whether the debtors' expenses could be reduced sufficiently to make the payments).

[57] *In re Nary*, 253 B.R. 752, 763 (N.D. Tex. 2000) (determining that it was permissible for the bankruptcy court to consider a projected increase in expenses in the near future under the first prong of *Brunner*). *Cf. In re Pena*, 155 F.3d 1108, 1112 (9th Cir. 1998) ("To require strict reliance upon [financial] conditions existing at the moment of trial could result in an accurate snapshot but a distorted picture. We do not believe Congress intended to impose upon the debtor or the bankruptcy court such a narrow focus.").

the *Brunner* test, so DOE is not entitled to summary judgment on this issue.

2. Whether additional circumstances exist indicating that Debtor's financial condition is likely to persist

This prong requires a debtor to demonstrate that his or her present financial situation is likely to be prolonged due to factors outside the debtor's control.[58] Courts must assess the debtor's prospective ability to improve her financial situation and repay the loans, considering factors such as the debtor's marketable skills, employment prospects, prior attempts to secure employment, and any inhibiting medical conditions.[59]

Plaintiff maintains that physical infirmities and difficulties speaking clear English render her unable to obtain employment or improve her financial condition. DOE refutes Plaintiff's assertions of physical and linguistic restrictions, pointing to Plaintiff's exercise schedule, ability to perform household and lawncare activities, academic performance in classes taught in English, and ability to communicate in English for shopping, on the telephone and performing other everyday tasks.

DOE contends that Plaintiff's efforts to seek employment were anemic.

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[58] *In re Gordon*, No. Adv.07-009049-MGD, 2008 WL 5159783, at *7 (Bankr. N.D. Ga. Oct. 10, 2008); *In re Beece*, No. 6:17-ap-00086-KSJ, 2019 WL 1769605, at *2 (Bankr. M.D. Fla. Apr. 18, 2019); *In re Mallinckrodt*, 274 B.R. 560, 566-67 (S.D. Fla. 2002).

[59] *In re Mosley*, 494 F.3d 1320, 1326 (11th Cir. 2007); *In re Wolfe*, 501 B.R. 426, 436-37 (Bankr. M.D. Fla. 2013); *In re Davis*, 373 B.R. 241, 250 (W.D.N.Y. 2007).

This Court concurs. Since the Loan repayment period commenced Plaintiff has applied for only two (2) jobs, one in 2015 and another just before DOE took her deposition, more than a year after she filed her Complaint. Plaintiff's only other effort at obtaining employment consisted of looking on a daycare website; again, just days before DOE took her deposition in connection with this adversary proceeding.[60] These efforts do not constitute a sincere or robust attempt to gain employment.

Similarly, Plaintiff's claim that her strong accent while speaking English has prevented her from obtaining gainful employment is questionable.[61] This assertion might be more convincing had Plaintiff's search for employment been more vigorous. For example, Plaintiff offers no evidence that she attempted to seek employment in a Spanish-speaking daycare or business when she resided in south Florida, which has a very large and growing Spanish-speaking population.[62] Further, even if Plaintiff's spoken

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[60] Doc. 55-17, pp. 43-45.

[61] Plaintiff claims that people have trouble understanding her when she speaks English. Doc. 55-17, p. 48. She rests part of this argument on the fact that she received assistance from a relative to complete schoolwork in English and was given an interpreter for her deposition. Doc. 80-3.

[62] *See, e.g.,* Mary Ellen Klas, *Hispanic Growth in Florida: Will it Determine Election?*, Miami Herald (July 2, 2016, 9:00 AM), https://www.miamiherald.com/news/politics-government/state-politics/article87250257.html#storylink=cpy ("New population data released by the U.S. Census bureau June 23 shows that the state grew by 1.46 million people from 2010 to 2015. Looking at ethnicity, Hispanics represent 51 percent of the growth. Looking at age groups, people 65 and older represent 46 percent of the growth. In five years, Florida's Hispanic population grew 18 percent overall — six times more than non-Hispanic whites, and more than twice as fast as blacks.").

English is at times difficult for others to understand, as she claims, it is obvious from her pleadings that Plaintiff has mastered written English.[63]

Although the evidence refutes Plaintiff's claim that her spoken English has prevented her from gaining employment, a material fact remains as to whether Plaintiff's health and physical condition prevent her from becoming employable.[64] So, DOE is not entitled to summary judgment on the second prong of the *Brunner* test.

3. Whether Plaintiff has failed to make a good faith effort to repay the Loans

A debtor's good faith effort to repay depends on the debtor's efforts to obtain employment, maximize income, and minimize expenses.[65] The Eleventh Circuit focuses its analysis of a debtor's efforts to maximize income

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[63] Plaintiff is cautioned against protesting this conclusion by claiming that her husband, a relative or an attorney have drafted the pleadings she has filed and signed. If a non-lawyer third party drafted Plaintiff's pleadings, that person has been practicing law without a license. *Sanz v. Fernandez*, 633 F. Supp. 2d 1356, 1363 (S.D. Fla. 2009) (*citing Fla. Bar v. We the People Forms & Serv. Ctr. of Sarasota, Inc.*, 883 So.2d 1280 (Fla. 2004) ("The drafting, preparing, or filing [sic] pleadings on behalf of another constitutes the practice of law and may not be engaged in by a nonlawyer."). If a lawyer has been drafting Plaintiff's pleadings behind the scenes, that lawyer has acted unethically. *Ricotta v. State of Cal.*, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998), *aff'd sub nom. Ricotta v. State of Calif.*, 173 F.3d 861 (9th Cir. 1999) ("Attorneys cross the line . . . when they gather and anonymously present legal arguments . . . . With such participation the attorney guides the course of litigation while standing in the shadows of the Courthouse door."). By signing her pleadings, Plaintiff has attested, under penalty of sanctions, to the veracity of any factual assertions, including the assertion that she is self-represented. Fed. R. Bankr. P. 9011(b)(3)–(4),(c).

[64] In the Eleventh Circuit, under *Brunner*, expert testimony is unnecessary to demonstrate how a given medical condition affects a debtor's ability to work. *In re Mosley*, 494 F.3d 1320, 1325-26 (11th Cir. 2007) (*citing In re Barrett*, 487 F.3d 353, 359-61 (6th Cir. 2007)).

[65] *Id.* at 1327 (*citing In re Roberson,* 999 F.2d 1132, 1136 (7th Cir. 1993)); *In re Roth*, 490 B.R. 908, 917 (B.A.P. 9th Cir. 2013) (*quoting In re Mason*, 464 F.3d 878, 884 (9th Cir. 2006)).

and minimize expenses on the third – "good faith" – prong of *Brunner*.[66] A debtor's actual repayment efforts are also relevant to the third prong of the *Brunner* test.[67]

DOE has established that no genuine issue of material fact exists, and that Plaintiff has failed to make good faith efforts to repay the Loans. Plaintiff admits that she has not made a single payment on the Loans, has never inquired about repayment options, and has never applied for an ICRP.[68] Plaintiff's token efforts to find employment, lack of any discernable effort to minimize expenses, and complete disregard for opportunities to apply for repayment plans fall far short of what is required to show good faith.[69]

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[66] *Mosley*, 494 F.3d at 1327 ("[A] debtor's 'failure to make a payment, standing alone, does not establish a lack of good faith.' … Good faith is measured by the debtor's efforts to obtain employment, maximize income, and minimize expenses; his default should result, not from his choices, but from factors beyond his reasonable control.") (citation omitted); *In re Acosta-Conniff*, 686 F. App'x 647, 659-50 (11th Cir. 2017) ("[The *Brunner*] test looks at three different time periods. The first prong focuses on the present ability of the debtor to repay the debt. The second prong looks to the future to determine the unlikelihood that the debtor could become able to repay the loan. The third prong looks to the debtor's past conduct to determine whether her actions in the past have manifested a good faith effort to repay that which she owes.").

[67] *In re Benjumen*, 408 B.R. 9, 21-22 (Bankr. E.D.N.Y. 2009); *In re Douglas*, 366 B.R. 241, 259 (Bankr. M.D. Ga. 2007); *In re Nightingale*, 529 B.R. 641, 653 (Bankr. M.D.N.C. 2015); *In re Barrett*, 487 F.3d 353, 365 (6th Cir. 2007).

[68] Plaintiff concedes that she did not know about the IRCP program until after she filed this adversary proceeding in 2018, even though her payments on the Loans were to begin in 2013.

[69] *E.g.*, *In re Kidd*, 472 B.R. 857, 863 (Bankr. N.D. Ga. 2012) (finding that a debtor did not make a good faith effort to repay because she had discretionary expenditures, had only sent several resumes, and was not actively seeking employment); *In re Little*, 607 B.R. 853, 861-62 (Bankr. N.D. Tex. 2019) (finding that joint debtors did not satisfy the good faith standard because their efforts to negotiate a repayment plan consisted only of obtaining deferments for a number of years, consolidating their loans, enrolling in an ICRP absent evidence of participation, and seeking a bankruptcy discharge of their loans, without having ever made any payments, once their consolidated loans came due).

Plaintiff's lack of good faith is clearly illustrated in contrast with the facts in *Bukovics v. Navient,* in which the bankruptcy court held nearly $73,000 of student loan debt dischargeable based on undue hardship.[70]

The debtor in *Bukovics* received her degree in 1990; her loan payments began in 1991; she was employed through November of 2008 when her employer filed bankruptcy, after which she received unemployment compensation through some time in 2011.[71] The debtor regained part-time contract work in 2012 and was again regularly employed from early 2013 through June of 2018.[72] At various times from 1991 to 1997 the debtor made payments; at other times she put the loans in deferment.[73] She was approved for loan consolidation in 1997; applied for and received forbearance from 1997 through July of 1999; and made thirteen (13) consecutive monthly payments from August 1999 through August 2000, after which she again received forbearance.[74] The debtor in *Bukovics* made another twenty-nine (29) loan payments from 2001 through 2004, forty-four (44) payments from 2005 through 2008, and two (2) more payments in 2008 and 2009.[75] Between June

[70] *In re Bukovics (Bukovics v. Navient ETC)*, No. 15 BK 38069, 2020 WL 949936, at *6, 12 (Bankr. N.D. Ill. Feb. 25, 2020).
[71] *Id.* at *2-3.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* In between these payments the debtor again put the loans on deferment.

1997 and January 2009, the debtor paid a total of $28,346.76 on her consolidated student loan.[76] The debtor filed bankruptcy in November, 2015 and sued Navient, seeking discharge of her student loans based on undue hardship.[77] The court in *Bukovics* found the *Brunner* test satisfied because the debtor's conduct demonstrated a good faith effort to find employment, maximize income, minimize expenses, and negotiate repayment.[78]

Bukovics, along with the overwhelming weight of applicable caselaw, demonstrates that Plaintiff has not demonstrated a good faith effort to repay.[79] Unlike Plaintiff, the debtor in *Bukovics* minimized her expenses by essentially removing from her budget all expenses for housing, transportation and food: she gave up both of her vehicles, moved out of her apartment and in with a friend rent-free, was on a government supplemental nutritional assistance program for food, and subsisted on money borrowed from friends and family.[80] Noting that *Brunner* does not require a debtor to live a life of

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[76] *Id.*

[77] *Id.* at *5-6. When the debtor in *Bukovics* filed suit against Navient seeking a discharge of her student loans pursuant to § 523(a)(8) she was still self-represented; thanks to an attorney who volunteered to represent her *pro bono,* the debtor ultimately won a judgment that her student loans were dischargeable. The debtor did not receive a discharge due to her failure to file a Certification that she had completed a Financial Management Course; after she reopened her case, she obtained a discharge of over $145,000 in non-student loan debt.

[78] *Id.* at *11-12.

[79] *E.g., In re Mallinckrodt*, 274 B.R. 560, 568 (S.D. Fla. 2002); *In re Mosko*, 515 F.3d 319, 325 (4th Cir. 2008); *In re Little*, 607 B.R. 853, 862 (Bankr. N.D. Tex. 2019); *In re Augustin*, 588 B.R. 141, 153 (Bankr. D. Md. 2018).

[80] *Bukovics*, 2020 WL 949936 at *8-9.

poverty to pay back student loans, the *Bukovics* court emphasized that "[s]ection 523(a)(8) requires the debtor to engage in 'belt-tightening' practices to make repayment of loans more likely" and to "make some sacrifices and live within the strictures of a frugal budget for the foreseeable future."[81]

Plaintiff has not engaged in any obvious belt-tightening, nor is she making sacrifices or living within a frugal budget. Although Plaintiff declares that she has been experiencing financial hardship since the Loans became due, the undisputed evidence of her discretionary expenditures for high-cost food, an expensive luxury car, larger than necessary homes and nonessential travel, show the opposite.[82]

Plaintiff's exceptionally feeble attempts to obtain employment also reflect a lack of good faith effort to repay.[83] Calling one daycare center and

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[81] *Id.* at *8 (*quoting In re Davis*, 608 B.R. 693, 704 (Bankr. N.D. Ill. 2019)). *See also Mosley,* 494 F.3d at 1327 (debtor living in "dire" conditions, made inquiries about resolving his student loan obligations with three agencies and his congressman, had no home or car, lived below the poverty line for years, and had held a series of jobs).

[82] *In re Lozada*, 594 B.R. 212, 225 (Bankr. S.D.N.Y. 2018), *aff'd*, 604 B.R. 427 (S.D.N.Y. 2019) (finding that debtor's move to a new residence with higher rent during the repayment period was inconsistent with a minimal standard of living because, the court reasoned, "to suggest that there were no suitable homes available at a lower rent strains credulity"); *In re Perkins*, 318 B.R. 300, 307-10 (Bankr. M.D.N.C. 2004); *In re Justice*, No. 14-13684-JDW, 2016 WL 6956642, at *4 (Bankr. N.D. Miss. Nov. 28, 2016). *See also In re Mosko*, 515 F.3d 319, 325 (4th Cir. 2008) (finding that expenditures on nonessentials demonstrated a lack of good faith effort to minimize expenditures).

[83] *Compare In re Gesualdi*, 505 B.R. 330, 345 (Bankr. S.D. Fla. 2013) (finding that an employment search involving only one overture to a job outside the debtor's field was indicative of bad faith despite the debtor's excuse that he failed to apply more widely because he would not have been qualified), *and In re Mallinckrodt*, 274 B.R. 560, 568-69 (S.D. Fla. 2002) (finding that a debtor's failure to contact potential employers within the debtor's field and geographic area indicated a failure to maximize income in good faith), *with Bukovics*, 2020 WL 949936 at *7 ("It is uncontested

visiting the website of another just days before her deposition suggests an endeavor to bolster her case rather than a good faith effort to repay.

Plaintiff's declaration that she could not find employment in part because she does not have CPR certification is an excuse, not evidence of good faith. Plaintiff could have obtained CPR training and did not; this was entirely within her control. A debtor may not willfully or negligently cause her own default, but rather her condition must result from factors beyond her reasonable control.[84]

Plaintiff suggests that her best working years are behind her. But courts have been reluctant to treat a debtor's age as an excuse where, as here, the "debtor was older when she went back to school and knew she would have to make payments in her later years."[85]

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that Plaintiff applied, in a sixteen month [*sic*] period, to over 200 part-time and full-time jobs, both in and out of her area of expertise. Nonetheless, no present employment has materialized from her efforts."), *In re Wolfe*, 501 B.R. 426, 440 (Bankr. M.D. Fla. 2013) (finding that a debtor's search for a broad spectrum of jobs across a large geographic area constituted a sufficient attempt to maximize income), *and In re Benjumen*, 408 B.R. 9, 22 (Bankr. E.D.N.Y. 2009) (finding that debtor's testimony that he had sent application letters to approximately 100 employers and contacted a jobs fair and job search firm, set out a genuine issue of material fact as to whether the debtor had made a good faith effort to maximize income).

[84] *Mosley*, 494 F.3d at 1327 (citation omitted); *In re Gordon*, No. Adv.07-009049-MGD, 2008 WL 5159783, at *8 (Bankr. N.D. Ga. Oct. 10, 2008) (*quoting In re Roberson*, 999 F.2d 1132, 1136 (7th Cir.1993)). Plaintiff makes another excuse for not searching for employment or reducing expenses: she claims that she and her husband cannot bear the upfront costs. *E.g.*, Docs. 55-9, p. 14 (costs of CPR training); and 80-2, p. 8-9 (cost of moving to a cheaper house). This excuse similarly fails to support Plaintiff's claim of acting in good faith because her alleged cash shortage is at least partially caused by her own failure to minimize expenses.

[85] *In re Little*, 607 B.R. 853, 862 (Bankr. N.D. Tex. 2019); *see also Goforth v. U.S. Dep't of Educ.*, 466 B.R. 328, 339 (Bankr. W.D. Pa. 2012).

Plaintiff asserts that failure to make any payments or enroll in an ICRP does not *ipso facto* prevent a finding of good faith. This argument is correct but incomplete. The relevant question is whether the failure to enroll in an ICRP, "among the totality of the circumstances such as her age, job prospects, her income, expenses, and repayment history, demonstrates good faith or lack thereof."[86]

Plaintiff's only effort to deal with, rather than pay, her Loans was to place them in forbearance. She cites this as evidence of good faith effort to pay. Caselaw is clear that obtaining forbearance is not indicative of good faith unless coupled with significant additional efforts to negotiate a repayment plan.[87] Further, there is no evidence that Plaintiff has made any effort to obtain employment since filing this adversary proceeding other than contacting a daycare a few days before DOE deposed her. "A debtor's obligation to make "good faith" efforts to repay [her] educational loans is not

[86] *In re Macon*, No. 12-42846-PWB, 2014 WL 5080410, at *5 (Bankr. N.D. Ga. Oct. 6, 2014). *See, also, Educational Credit Management Corp. v. Polleys,* 352 F.3d 1302, 1311 (10th Cir. 2004).

[87] *In re Gesualdi*, 505 B.R. 330, 345 (Bankr. S.D. Fla. 2013. *Compare, e.g.*, *In re Nightingale*, 529 B.R. 641, 653 (Bankr. M.D.N.C. 2015) (finding that a genuine issue of material fact existed as to the debtor's good faith because she had filed two applications for consolidation, she enrolled and participated in an ICRP after receiving information about it from the loan servicer, and she demonstrated ongoing contact with the loan servicer), *with, e.g., In re Augustin*, 588 B.R. 141, 153-54 (Bankr. D. Md. 2018) (finding that a debtor did not demonstrate good faith based on efforts consisting of years of obtaining deferments and one conversation with DOE wherein debtor rejected a proposed repayment plan because it extended the repayment period beyond debtor's planned retirement).

extinguished with the filing of an adversary proceeding in bankruptcy."[88]

In short, Plaintiff's failure to significantly reduce expenses or seek employment throughout the Loans' repayment period is incompatible with a finding that she has made a good faith effort to repay the Loans.[89]

CONCLUSION

This Court, like others, is not unsympathetic to debtors who have medical and financial problems along with student loan debt. But, the burden of proving each prong of the *Brunner* test is on the debtor; here, the Plaintiff. Viewing all material undisputed facts in favor of Plaintiff, DOE has shown that Plaintiff has not met her burden of proving the third prong of the *Brunner* test: she has not demonstrated a good faith effort to repay the Loans. For that reason, DOE is entitled to summary judgment in its favor as a matter of law.

For the reasons stated, it is

ORDERED:

1. The *United States Department of Education's Motion for Summary Judgment* (Doc. 55) is GRANTED.

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[88] *In re Wallace*, 259 B.R. 170, 185 (C.D. Cal. 2000).
[89] *E.g.*, *In re Lozada*, 594 B.R. 212, 225 (Bankr. S.D.N.Y. 2018), *aff'd*, 604 B.R. 427 (S.D.N.Y. 2019); *In re Gesualdi*, 505 B.R. 330, 345 (Bankr. S.D. Fla. 2013).

2. The hearing on the Motion, currently scheduled for March 25, 2020, is CANCELED.

DONE and ORDERED on March 24, 2020.

KAREN K. SPECIE
Chief U.S. Bankruptcy Judge

Defendant's attorney is directed to serve a copy of this Order on interested parties and to file a Proof of Service within three (3) days of entry of this Order.